United States
Circuit Court of Appeals
For The Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiff in Error,

vs.

A. D. BRANHAM,

Defendant in Error.

Upon Writ of Error to the District Court of the United States for the Eastern District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

PLUMMER & LAVIN,
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Attorneys for Defendant in Error.

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MOTION TO STRIKE BILL OF EXCEPTIONS.

Comes now the Defendant in Error and moves the court to strike from the records of this cause, the Bill of Exceptions herein, upon the following grounds:

1.

That the same was not lodged with the Clerk of the District Court within ten days after the verdict and judgment in this cause, pursuant to Rule 75 of the Revised Rules of the United States Circuit Court and the United States District Court of the District of Washington.

2.

For the reason that the District Judge had no power, jurisdiction or authority to extend the time for the filing, serving or delivering to the Clerk, the Bill of Exceptions proposed by Plaintiff in Error.

Defendant in Error further moves the court to affirm the judgment of the District Court.

PLUMMER & LAVIN,
JOHN SALISBURY,
Attorneys for Defendant in Error.

ARGUMENT.

The verdict of the jury was returned on September 24th, 1918, and the judgment was entered on September 25th, 1919 (Tr. 106). No action was taken by Plaintiff in Error by way of preparing, serving, filing or lodging with the Clerk a proposed Bill of Exceptions until November 18th,

1918, and after the ten days provided by rule had expired, on which date Plaintiff in Error applied to the Judge of the District Court for an order "extending the time within which Plaintiff in Error may file its Bill of Exceptions, for a period of thirty days from the date of the filing of the order denying the motion for Judgment Non Obstante and Motion for New Trial" (Tr. 109). No showing of any kind was made in support of the application. Thereupon, on the 18th day of November, 1918, over the objection of Defendant in Error, the Court made an order granting said application (Tr. 109), a copy of which was delivered to Defendant in Error, and objection to service of the same was entered and made upon the ground that it was contrary to the rule of court (Tr. 110). A proposed Bill of Exceptions was lodged with the Clerk of the court on November 16th, 1918. On December 24th, 1918, and before the order was made by the Court, settling the proposed Bill of Exceptions, Defendant in Error served and filed a Motion to strike the proposed Bill of Exceptions upon the grounds which are fully stated at pages 112 and 113 of the Transcript. Rule 75 of the rules in force in this District (see Revised Rules of the United States Circuit Court and the United States District Court of the Dis-

trict of Washington) provides as follows:

> "The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial, *within ten days after the rendition of the verdict* * * * serve upon the adverse party a draft of the proposed Bill of Exceptions."

At the time the court made the order enlarging the time for lodging the proposed Bill of Exceptions with the Clerk of the court, the court said:

> "I do not believe that the order is of any force or value in view of the fact the time has already expired." (Tr. 112-113.)

In this connection, it might occur to your Honors, what injury has been done Defendant in Error on account of the extension of time being granted; and the court might feel that if there was no injury done, that although the granting of the extension of time was without authority or jurisdiction, if there was no injury done the Defendant in Error, and no advantage accruing to Plaintiff in Error by reason thereof, that this court might disregard the irregularity. We think, however, that the purpose of the rule was to require a Bill of Exceptions to be lodged with the Clerk within ten days after verdict or judgment, on account of the fact that the Judge would have the testimony, the instructions and exceptions fresh in mind, and no official stenographer being authorized

to take the testimony, the court would have to rely upon its notes and memory should a dispute arise as to what had occurred during the trial, whereas, by extending the time indefinitely, disputes would arise between the parties as to what had occurred during the trial. Therefore, the purpose of the rule is apparent, and that is the reason for the ten days' limitation, and while the court has power to extend the time, if application therefor is made *before the time has expired* as provided for by the rule, it can refuse to do so, and should refuse to do so unless a showing is made upon which the extension is requested. By the order which was made by the court extending the time for the filing of the Bill of Exceptions herein, the Defendant in Error was prevented from proposing any amendments, because, if she had done so, according to the weight of authority, she would have waived her right in this court and the lower court to move to strike the proposed Bill of Exceptions. The authorities seem to agree that if amendments are proposed, the violation of the rule as to time is waived. Therefore, we were compelled to submit to having the present Bill of Exceptions signed and certified without correcting the numerous errors contained therein, by way of amendments. We take it that this is a rule of practice which means something, and if a party

can wait for a month after the ten days has expired before they apply for an extension of time or lodge with the Clerk their proposed Bill of Exceptions, then the rule of practice might as well be wiped out, and everything run upon a "haphazard" principle. In the case of Alverson vs. O. W. R. & N. Co., decided by this court on Sept. 5th, 1916, 236 Fed. 331, the plaintiff did not take any exceptions to the instructions of the court while the jury was at the bar, as provided by the common law practice and the rule of court. In that case, both parties signed a stipulation, giving plaintiff thirty days within which to file exceptions to the instructions of the court, and, it will be observed, that the same counsel appeared in that case as appear in the case at bar, and counsel for the railway company contended in that case, the same as we now contend in this case. Counsel went further in that case, and after signing a stipulation granting an extension of time beyond the time provided by the rule, they repudiated that stipulation and argued that it was void, and that the court had no power to permit taking said exceptions at any other time than that provided by the rules, that is, while the jury was at the bar. It seems to us that if the court is going to enforce the rule as announced in the Alverson case against

us and in favor of the same counsel, it should, in this case, enforce the rule we contend for against the same counsel.

STATEMENT OF THE CASE ON THE MERITS.

(We shall designate the parties as Plaintiff and Defendant, the same as they were designated in the lower Court.)

Some time prior to February 4th, 1916, there existed in the city of Pullman, Washington, a certain bridge across a creek. This bridge was adjacent to or was part of a roadway that crossed over the rights of way of the Northern Pacific Railway Company and that of the defendant. By some arrangement with the city of Pullman, the defendant was engaged in the rebuilding or rehabilitation of this bridge, and had been so engaged, and in charge of the bridge, through its workmen and superintendents for several months prior to the accident to plaintiff, which occurred on February 4th, 1916. The contract between the city and the defendant provided, among other things, that the city should have the bridge closed to traffic during its reconstruction but the same was not closed either by the defendant or the city, and, during all of the time in question, so far as the use of the same by pedestrians was concerned, both parties

seemed to have disregarded and waived that part of the contract. From the record it appears that the bridge was constructed, as most bridges of that character are, with a driveway through the center for the use of vehicles, and sidewalks upon either outer side for the use of pedestrians, and at the time of the accident a railing extended along the sides of the bridge, and along parallel with the walkway on the south end of the bridge, up to within about twenty or thirty feet of the south end. During the reconstruction of the south end of the bridge, the defendant had placed a plank walk for the public extending from the south approach to the bridge extending northerly over to where the railing again commenced, and to a point where the sidewalk remained intact on the north end thereof. Apparently, and to all intents and purposes, these planks were laid for the purpose of permitting the passage of pedestrians from the railway stations, and from the south part of the city, over to the central portion of the city, or the business district. During all of this time, after the planks were laid by the defendant, from 300 to 500 people would pass over the bridge daily, along the planks in question and over upon the walkway on the south end of the bridge. The bridge was situated in the center of the business

district and the street in question was used and traveled more than any other street in the city. Either the city or the defendant had erected a barrier, extending from the east edge of the improvised walkway, or the west edge of the driveway across the driveway easterly for the purpose of preventing vehicles from going upon or crossing the bridge, for the reason that there was no extension of the *driveway* portion of the bridge provided from the portion under reconstruction over to the solid ground. This barrier only ran to the edge of the walkway, but in no wise did it act as a barrier across the walkway so far as traffic by pedestrians was concerned. Witness Pinkley testified upon cross examination by defendant's counsel as follows:

> "There was a barrier across the right of way at the north (south) end of the bridge * * *. I believe there was one rail. If I remember right, extended *from* the sidewalk."
>
> "Q. And how did pedestrians get up on the sidewalk on the bridge past that barrier?
>
> A. Well, I know how I did. I swung around the barrier on the end.
>
> Q. Just step down here to the front of the jury and show—
>
> MR. PLUMMER: There is no dispute about that, Mr. Hamblen, they all walked around the barrier.
>
> A. I saw this Exhibit One before up in

Mr. Plummer's office. Possibly the barrier extended *to the east line of the sidewalk here,* I would not say. I would say that it did not go clear to the line. (Meaning the west edge of the improvised walk.) I would say that it stopped within a foot of the line. It stopped within a foot of the east line at this point marked "Y" about there. In coming down from the north going southerly along there and swinging around this barrier *I do not believe it was necessary to get off of the sidewalk at all before reaching these planks."* (Tr. 35.)

Witness Reed testified as follows (Tr. 23):

"Q. For three weeks previous (to the accident) were there any barriers on the sidewalk, on the south end of the approach across the end of the sidewalk, on the south end of the bridge, during all of the time that you speak of?

A. There was nothing there at any time that I know of that would hold them to go through, *but the barrier was across the south end of the driveway, and the openings were left open for foot passengers just the same as ever."*

This same witness testified on cross examination:

"Q. Now will you just step down here again and look at this Exhibit One and show the jury just where this obstruction or barrier that you referred to was placed with reference to the north end of the bridge here?

A. It was right at the edge here, the railing across there that would keep the people from there was right at the edge there, at the end of the sidewalk, and extended clear *to the east line* of the sidewalk. There was no notice given there on that barrier to warn people,

> not to cross there that I know of except at night there would be a red light in here, in the middle of the bridge." (Tr. 25.)

From this testimony it appears that the barrier was put across the driveway for vehicles, and probably extended over the edge of the driveway a few inches, so that people walking on the planks would swing their body around the end of this barrier, at the same time keeping upon the sidewalk which the company had provided. Work had been suspended upon the bridge by the defendant for a few days on account of bad weather, but the bridge had not been turned over to the city and was still being constructed under the contract with the city, and was still under the control of the defendant at the time of the accident. The planking which had been laid by the defendant were used constantly by the public, and a well-beaten pathway was apparent upon the same. There was no barrier across the north end of the sidewalk which connected with the improvised walk, which clearly indicated, that the walk for pedestrians. and the one built by the company for temporary use, were still open to the public, and the public was impliedly invited to use the same. If the company had not provided the planking, and laid them as they were laid, the public could not cross the bridge at all until the same was completed. The planks

were not nailed or fastened in any manner, and would "wabble" about and become more or less misplaced by use by the traveling public. On February 4th, 1916, at about 6 o'clock, P. M., and it being dark at the time, the plaintiff, who had formerly lived at Pullman, but who had been away for several years, attempted to use the walkway constructed by the defendant for the purpose of crossing the bridge on her way from the home of her brother-in-law to the central portion of the city, following the foot traffic ahead of her and using this street, it being a public thoroughfare. A light snow had fallen the night before which had obscured the hole or space existing between the planks in question, and while walking upon the planks, she slipped, and her foot went into an opening between the planks, and she fell over, her foot and ankle catching between the planks, and she sustained a serious injury to her back, her ankle was broken, resulting in what the physicians who testified characterized as a Pott's fracture of one of the ankle bones, and another bone was "chipped" off near the ankle joint. This action was brought to recover damages for the injuries negligently inflicted, resulting in a verdict in the sum of $3750.00, upon which judgment was rendered, and from this verdict and judgment defendant has taken this writ of error.

ARGUMENT.

Defendant, in its brief, has made the mistake that is usually made in this class of cases, by quoting that part of the evidence which appears *most favorable* to the defendant, and remaining silent as to that portion of the evidence most favorable to the plaintiff. This Court has frequently enunciated the rule which has been enunciated by practically all of the courts, that upon demurrer to the evidence, or upon motion for *judgment non obstante veredicto,* which is the same thing, the evidence most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, which tend to support the plaintiff's claim, shall only be considered by the appellate court, and we are now only called upon to determine whether or not there is any evidence, or any reasonable inferences to be drawn therefrom, tending to prove the legal liability of defendant for the injuries sustained by the plaintiff. The railway company was an independent contractor, and independent of any contract which it may have had with the city, it cannot escape its liability for injuries sustained by a third party due to its negligence. Therefore, the defendant's contract with the city is wholly immaterial, except to show that the defendant had charge of the rebuilding of the bridge,

and all that was done in and about its rebuilding was done and performed by the defendant, and it would be liable for any injury resulting from its negligence, so far as a third person was concerned, just the same as the city would be if it had been carrying on this work as a municipality, and it is wholly immaterial as to whether or not the city would also be liable for permitting a dangerous structure to be erected and maintained, and invite the public to use the same as a thoroughfare. The city and the defendant were undoubtedly joint tort feasors, and either, or both, are liable. In this case the company was primarily liable, and the liability of the city was secondary.

Defendant makes some very startling statements in its brief from which we quote as follows:

> "The plaintiff in error which hereafter we will refer to as the railroad company, was under no obligation to protect the public against the dangers incident to the use of the said bridge *unless the railroad company knew that the public was using it* and that the city was failing to perform its obligation under the contract referred to. There isn't a suggestion of any evidence that the railroad company had any notice, nor is there any evidence that during the entire period that said work was suspended that the railroad company knew anything of the dangerous condition of said bridge, or that the public was using or attempting to use *any part of the temporary structure placed there by the railroad com-*

> *pany.* In fact, there was no evidence offered by the plaintiff to show that the planking upon which Mrs. Branham fell, was placed there by the railroad company."

The evidence does show that the defendant had charge of this work, and that it had not turned the bridge over or permanently suspended operations there until a long time after the accident, and after the bridge was completed. When counsel say that the company was under no obligation to protect the public "against the dangers incident to the use of the bridge unless the company knew that the public was using it, and that the city was failing to perform its obligations under the contract," this is an admission that if the company *did know,* it *was under obligation* to protect the public from injuries resulting therefrom. It was in charge of the bridge and the work being carried on there. It placed the planking down there, apparently for the use of the traveling public. It knew how the planking had been placed, and knew whether the planking had been fastened, or otherwise, and whether it was reasonably safe for the use for which it was apparently intended. Five hundred people were using the walkway daily, and the company cannot shut its eyes to the fact of its condition or use. The jury in this case had a right to infer, from all of the surrounding

circumstances that the company did have such knowledge and notice and took no steps to remove the danger or erect a barrier across it. Counsel further say that there was no evidence that the defendant placed the planking at the point where the plaintiff was injured. Witness Reed testified it was bridge planking, the same as had been used in and about the bridge, and was placed there while the company had charge of the bridge construction, but witness Hooper, called as a witness in behalf of the defendant, testified as follows:

> "I am street commissioner of the city of Pullmen. * * * but the sidewalk had been taken out by the bridge crew, that is, the railroad crew, and they had laid some three by twelve lengths (planks) paralleling where the old sidewalk used to be in the place of the sidewalk, and the pedestrians were traveling on the left hand side of that, and at the end of this bridge plank over there there was three more planks laying across to catch the bridge, so the pedestrians could use that to cross." (Tr. 79.)

On page 83 of the record he testified upon cross examination as follows:

> "The plank lay across from that bridge over to here for them to go on. *The bridge crew laid the planks there.* The plank that the people were supposed to walk on *were laid there by the bridge crew* (of defendant) *so that people could get onto this bridge from this street across to here.*"

Therefore, it must be conceded, that the company having charge of this bridge, and that it laid the plank as a continuation of the regular traveled portion of the bridge used by pedestrians on the southwest end thereof clear up to the solid ground, and holding open and inviting the public to use the same as a foot passageway, the company was under obligation to so erect and construct this walkway so that the same would be reasonably safe for the use to which it was being put upon the implied invitation of the defendant. Inasmuch as the defendant does not, in so many words, admit liability, even though these facts were true, although their requests for instructions and the matter contained in their brief, clearly indicate a confession that their liability was a question for the jury, we shall refer the Court to the following authorities:

Wilton vs. Spokane, 73 Wash., 619.

Kaler vs. Puget Sound Bridge and Dredg. Co., 72 Wash., 497-501.

Hoyt vs. Independent Asphalt Paving Co., 52 Wash., 672.

In the Hoyt case, *supra,* the facts are peculiarly applicable to the facts in this case. The paving company had a contract with the city of Seattle for the paving of one of the streets, and during

the progress of the work the contractor laid planks alongside of a car line for use of passengers of an electric company operating cars along the street that was being paved. A passenger alighting from a car, stepped upon the plank, which tipped up, and she fell and was injured. A verdict for plaintiff against the contractor was sustained. The court in passing upon the same question as is raised here, says:

> "There seems to be no reason for the contention that the appellant was not responsible for the condition of the streets. It is not denied that it entered into the contract with the city to do this work, or that the putting down of the plank which was the cause of the injury was the act of the appellant."

See also:

Cox vs. City of Philadelphia, 165 Fed. 559.

The Cox case, supra, cites approvingly the case of Eby vs. Lebanon County (Sup. Ct. of Pennsylvania), 31 Atlantic 332, holding independent contractors of the county liable for their negligence in failing to properly guard a trench they had constructed into which a pedestrian fell and was injured.

BARRIERS.

Defendant seems to take it for granted, as indicated by its vigorous assertion, that the company or the city had placed barriers across this improvised sidewalk for the purpose of warning the

public against its use, and claim the plaintiff and other persons purposely evaded and disobeyed the warning indicated and walked over the planks around the end of the barriers. The record does not bear out any such suggestion. There was substantial evidence tending to show that no barriers had been placed across the walk at all, and never had been. In addition to the evidence heretofore quoted upon this matter, in our statement of the case, we quote from the record, page 31, and from the upper part of page 32, from the testimony of witness Reed, upon cross examination by defendant's counsel as follows:

> "Q. In regard to the barriers at the south end of the bridge, you say as a positive fact that the barrier did not extend across the sidewalk on the south end of the bridge?
>
> A. No, sir, there wasn't anything across the sidewalk that I ever seen, but there was across the bridge, the main bridge. It was across the sidewalk *on the other side, the other side of the south end.*"

(It will be noted that Reed crossed this walk a few minutes before the accident.)

Then there was evidence given by witness Pinkley, heretofore quoted, in our statement of the case, that the barrier which was placed across the *roadway* possibly extended overa few inches, perhaps a foot, over the sidewalk way, and persons using

this walkway would swing around the end, but did not have *to step off the plankway in order to do so.* Then, on the part of the defendant, witness Hooper, street commissioner of the city of Pullman, testified that barriers had been erected. From this the court will readily see that there was a conflict in the evidence as to whether the company had performed its duty and placed a barrier across the end of the improvised sidewalk or whether or not the barrier had not been placed so as to give people notice that the way was barred. This is a court for the correction of errors, and not for the trial of questions of fact, or the weighing of conflicting evidence, as it has so many times announced.

Upon this phase of the case, counsel cite the case of Hunter vs. Montesano, 60 Wash., 489. We have no fault to find with this decision and it is no doubt good law, when there is a showing of facts which make the doctrine applicable. Of course, if, in the case at bar, the evidence conclusively showed that there were barriers across the sidewalk at the place where the accident occurred which prevented people from using the walkway in question, then plaintiff would be guilty of contributory negligence, precluding a recovery. At least, it would be a question for the jury, like all other questions of fact.

DEFECTS IN WALK.

With reference to the planking, witness Reed testified at page 20 of the record, as follows:

> "Those were bridge plank or something. And the other one was laying a little further west from that, an inch and a half or two inches or something like that. That is, it was not always that way, of course, as the planks got loose and thawed out a little like it kind of jumped around. It was on small rock or gravel or loose stuff as would be about a bridge in building that way. There was a crack between two planks. Those planks were supposed to be twelve inches wide, I think, what they call bridge plank. I don't know what else they could be put down for except to walk across, because we could not get across there without there being something there, the way they had it."

Witness Pinkley testified as follows:

> "I was going from town and was using this same path or foot bridge that she was using. To the best of my recollection there were two planks laid parallel with the sidewalk, and the snow had become packed on top of these planks and rounding off a little bit. There was some space between the planks, not very much." (Tr. 34.)

On page 36 of the record he said:

> "There was a well defined trail through there, a path there, because there was a good many people traveling there. The trail ran across these boards. I had to walk on those boards, I know."

Plaintiff testified as follows:

> "It was dark * * * my foot seemed to slip into a hole of some kind, or crack. I had the impression that my foot was going through the bridge, and I fell and broke my ankle and also hurt my back. * * * when I felt my foot go out from under me or slip, or whatever it was my body went over to the left and my foot felt as if it was in a hole in the crack. When I fell I pulled my foot out. When I started to walk across there, there was nothing to indicate at that time that there was any crack between the boards or any hole to fall into. There was snow, lumps of snow on this planking to obscure any crack between the boards or hole to fall into. The path seemed to be lumpy." (Tr. 40.)

On cross examination she testified as follows:

> "Q. I will ask you, Mrs. Branham, whether or not as a fact the cause of this accident was the slippery condition of the walk, in your—
>
> A. No. It was because my foot slipped into a hole or something of that sort, or crack, I could not just exactly describe it. I presume it must have been a hole in the boards because I was walking on the boards, or where the boards should have been. I did not examine it to see. I did not make a thorough examination, but I know my foot slipped into a hole. I never examined it afterwards. Yes, I can say at this time there was actually a hole there in those boards; there was a hole that my foot slipped into of some kind." (Tr. 45-46.)

On re-direct examination, record, page 47, she testified:

> "I could not tell how far my foot went down through this plank; it only, it went far enough so that it gave a twist. I felt the sides of my ankle against something when I twisted it and dropped over."

The court will observe this accident occurred at 6 o'clock P. M. February 4th, 1916, just after dark. The plaintiff had not been down across this bridge before for several years, and the darkness and snow undoubtedly obscured the hole or crack into which she stepped. At least, the jury could so find.

We contend, that it was the duty of the defendant, so far as this walkway was concerned, to construct and maintain the same in a reasonably safe condition considering the use to which it was devoted by reason of the invitation of the company to its use by the public. The defendant must have known that if these planks were loose, that they would move around during the interval that the company had temporarily suspended operations, and the slightest precaution upon its part, if taken, would have placed the planking in such condition as to prevent holes being caused therein by its use while the defendant had charge of it, and while it knew the public was using it as a walkway. We do not contend that the company was under any obligations, in the first instance, to construct a walk for the use of the public at that point. It

could have removed the plank altogether, or never have placed them there. Then the public would have to find some other way to get to town from one portion of the town to the other, but when the company saw fit to construct this plankway for use by pedestrians, it then became its duty to so construct and maintain it during the time it had charge of the bridge, in a reasonably safe condition for such use, and, if it failed to do so, and injury was caused by reason of such failure, it certainly was liable, from any standpoint of justice or right; or it should have erected a barrier for the purpose of preventing people from using the sidewalk. The defendant cannot be heard to say: "We placed these planks here for the use of the public. Still we did not have any notice of the fact that the public was using it, although the whole community knew that at least five hundred people per day passed over the sidewalk in question for a long time prior to the date of the accident, and we were under no obligation to place them in a safe condition or maintain them in a safe condition, or pay any attention to them after they were placed there."

Defendant argues the effect of a claim which was made to the city by plaintiff, which was offered and admitted in evidence. This claim was only

admitted by the court for the purpose of showing any contradiction or inconsistent statements which plaintiff might have made at the time of filing the claim as distinguished from her testimony in this case, and the jury was instructed, as will appear at page 103 of the record, that it was offered and admitted solely for such purpose. Inasmuch as this court is not engaged in weighing evidence, that being the sole province of the jury, we think further argument upon this question is unnecessary.

Counsel in their brief assert that the immediate cause of the injury was the slippery condition of the walk in question, and such being the case, that plaintiff should not be permitted to recover, and cite the case of Stone vs. Boston & Albany R. Co., 41 L. R. A., 794. Counsel no doubt failed to read the case cited, for the same has reference to the intervention of a "human being" between the original cause and the resulting damage. While no doubt familiar with the decisions of the Supreme Court of our state, they have failed to call the court's attention to the case of Wren vs. Seattle, 100 Wash. 74, where a host of cases are collected from numerous jurisdictions, where that court dealing with a question identical with that here presented say:

> "Moreover, even assuming as a fact that the sidewalk was slippery from snow and ice, respondent did not, as a matter of law, assume the risk of a broken board *or crack* in the sidewalk itself sufficient to admit his foot should he slip, nor the risk of injury inherent in the walk itself."

And at page 75 the court say:

> "No court, so far as we are advised, has ever held that the excusable existence of snow and ice, operating merely as a contributing condition in causing an injury by some defect in the walk itself, can be successfully asserted in absolution from liability for injuries caused by such inherent defect."

Furthermore, the court instructed the jury (Tr. 102) that if the sole cause of the injury was the accumulation of the snow and ice that plaintiff could not recover, for the reason that the railway company was not responsible for such accumulation of snow and ice, which is almost identical with Instruction No. 5 (Tr. 95) requested by defendant.

The suggestions here made, should immediately dispose of the claim of defendant in this regard.

INSTRUCTIONS.

Defendant takes exception to an instruction given by the Court, as follows:

> "If you find for the plaintiff, it will be incumbent upon you to insert the amount of her recovery. You will compensate her for any loss which she has sustained through the im-

> pairment of her earning capacity in the *past,* although I believe that there is no testimony before you as to what her earning capacity was. These items will make up the amount of your verdict, in the event that you find for the plaintiff."

Defendant argues at length and cites numerous authorities which it claims supports its claim with reference to this instruction. None of the authorities cited sustain defendant's contention, when we consider the evidence in the case at bar, as distinguished from the evidence in those cases, but we think we can dispose of this assignment of error so as to obviate the necessity of the Court examining the authorities or considering it further. This instruction was given upon the express invitation and request of the defendant, and is in effect and substance identical with Instruction No. 12 (Tr. 98) requested by the defendant, which was as follows:

> "If under the instructions I have given you, you find that the plaintiff is entitled to recovery, then you will allow her such sums as will fairly compensate her for the pecuniary loss which she has suffered by reason of the injury complained of, and in this connection you may take into account her age, habits of life, industry; *the work and character of work performed by her prior to the accident, the work and character of work, if any, which she has performed since the accident;* the pain and suffering, if any, as a result of the injury."

Before the court instructed the jury, as shown at page 93 of the record, defendant requested certain instructions, and the record contains the following:

> "Thereupon, before the court instructed the jury the defendant requested the court to give the following instructions"

and the defendant thereupon requested the court to give the instruction just quoted (Tr. 93), and also requested the court to give Instruction No. 13, as follows:

> "If under the charge of the court you should find for the plaintiff, yet if under the evidence you believe that the plaintiff is able to work and earn money, it is her duty to do so and thereby lessen and avoid so far as she can do so the consequences resulting from the injury complained of, and it is your duty in assessing the damage to diminish the amount thereof to that extent."

These instructions are clearly intended to instruct the jury to compensate the plaintiff for any loss which she has sustained through the impairment of her earning capacity in the *past,* otherwise why consider her "pecuniary loss?" Why would the jury be allowed to take into consideration "her age and habits of life, and industry, the work and character of work performed by her prior to the accident, and the work and character of work, if any, performed by her since the acci-

dent?" Evidently, at the time this instruction was requested by defendant and given by the court, the defendant was under the impression and belief that there was evidence sufficient to show that her earning capacity had been impaired in the past, and we pleaded the loss of earning capacity specially in our complaint (Tr. 6-7); and although we did not prove the exact number of dollars she had lost by reason of her injuries, which would have been speculative, to say the least, and would depend upon a number of things as to just what amount she could have earned. This would not prevent the jury from considering the damages sustained by her by the impairment of her *earning capacity.* The court remarked in giving the instruction that "although I believe that there is no testimony before you as to what her earning capacity was," this was a mere comment by the court on the evidence, and intended to mean that it had not been proven in *dollars and cents.* It will not be construed as meaning, that there was no evidence of any loss sustained in the past by reason of the impairment of plaintiff's earning capacity, and the jury would be just as good a judge as the plaintiff herself as to what she has lost by reason of this impairment, and, while she could testify as to what she could earn prior to the accident, this would be evidence the jury might

consider in determining what she could probably have earned between the time of the accident and the day of trial when she testified. It would not be binding upon the jury. They could consider her age and the class of work she was fitted to perform, and what is usually paid for that class of work, and what her living expenses would ordinarily be, and could arrive at some reasonable conclusion as to her probable loss. No one can testify as to what she would have earned. At best, it would be a mere estimate, on her part, and if she testified that she could have earned $100.00 per day, the jury would not be bound by her testimony. We submit there is sufficient evidence in the record upon which the jury could base a finding of damages for loss sustained through the impairment of her earning capacity in the past.

We quote from the plaintiff's testimony contained in the record as follows:

> "Was engaged in the business of dressmaking at that time and had been engaged in that business for over five years (Tr. 39). I didn't know that I was hurt as badly as I was. My limb felt numb when I started to walk, and I didn't know that my foot was broken. I went to a store and then called for a taxi. I was laid up at the residence of my brother-in-law for about three months, and during that time suffered a great deal of pain from that ankle, very bad pain. I did not sleep very much from my ankle and my back (Tr. 41). The

only way I have of making a living is by dressmaking. I have not been able to carry on that business since the accident on account of my back and ankle. If I run the machine three or four days I am laid up a day or so. I have never felt real well since. I was perfectly healthy before this time." (Tr. 42.)

Dr. Pattee testified as follows (Tr. 55):

"If this patient's business had been that of dressmaker, where she had to use that foot constantly on a sewing machine or something of that kind, that would impair her capacity, it would incapacitate her in gaining a livelihood because you cannot immobolize any joint without getting some irritation upon use and also some stiffness, to immobolize any joint will cause stiffness, or an ankylosis (Tr. 55). As I told her at the time she would have trouble with it for a couple of years possibly, before that straightened, totally straightened out, as many times it will run over a period of two or three to five years and they will have a weak joint there and have to watch it. In a woman of her age and the occupation that she follows it would inhibit her from that source of livelihood for I think conservatively, could say for two or three years, as she follows the work of millinery and dressmaking. At that time she complained of her back terribly. In the wrench which she gave herself naturally she wrenched her back and the muscles of the back. That was evident. * * * I couldn't state how long that condition would remain. * * * I mean to say that in the ordinary case of a fractured limb, it would be weaker than the other; weaker than it was before very probably for a period of five or six years after the accident." (Tr. 62.)

Dr. Setters testified:

> "I know the plaintiff in this case treated and examined her ankle professionally, some time ago, the first one the 4th of February, 1917. She had a Pott's fracture, which was broken, one broken bone, and a chip off of the other bone, leaving a weakened ankle, and she was then in a neurasthenic condition, which means a general nervous breakdown, which was very marked at that time, decidedly (Tr. 74). Considering that she was forty-one years of age when it happened and considering the recuperative powers of a woman of that age as compared with others, a break of that kind usually involves the joint, and usually leaves a stiffness of the joint through life. I don't think it would ever be repaired as it was before the break. * * * In the examination of the back there was very little found except there was an increased irritability over the spine and also of the nerves below the spine. She had traumatic neurasthenia. * * * A neurasthenic cannot earn money becauses her whole concentration of mind is on themselves." (Tr. 75.)

Therefore, we conclude that there was abundant evidence in the record showing some damages to her on account of her loss of earning capacity, and (2) that if the court committed error in giving the instruction complained of it was invited and requested by defendant, and (3) the instruction is much more favorable to the defendant than it had a right to have given, and does not contain as many elements of damages as was included in the

requested instruction proposed by defendant. The elements of pain and suffering are absent from the instruction given by the court, but are included in the instruction requested by defendant.

THE VERDICT WAS NOT EXCESSIVE.

Considering the injuries sustained by the plaintiff the verdict returned cannot be claimed as being excessive, and if the claimed error as to the instruction heretofore referred to is to be disregarded by this Court, then this Court cannot pass upon the question of excessive verdict, as it has so many times announced, because the question of the excessiveness or inadequacy of a verdict can only be considered by the trial court on Motion for New Trial, and any order made with respect thereto is not an appealable order and cannot be reviewed by this Court.

The last instruction complained of appears at page 101 of the record and is as quoted on page 24 of defendant's brief. The objectionable part of the instruction, according to defendant's brief seems to be the following words: "If you find that the *city* knew that the bridge was to be used by the general public," etc. The word *city* is either a mistake which in some manner has crept into the bill of exceptions, and escaped the notice of

either side, or, if actually given by the court, it was clearly an inadvertence on the part of the court, for by reading the instruction it is apparent that the court clearly intended to use the word "company," instead of the word "city," and this was evidently the understanding which defendant had of the instruction at the time it took its exceptions to the instruction in question, for the reason that the claim now made was not even suggested at the time of the taking of the exceptions, which will be found at page 105 of the record, and in defendant's assignments of error (Tr. 123) referring to this instruction defendant said:

> "The Court erred in instructing the jury as follows:
>
> "If you find from the preponderance of the testimony in this case that the sidewalk where this injury occurred was constructed by the Oregon-Washington Railroad & Navigation Company, for the use of foot-passengers in the city of Pullman while the work was under construction; or, if you find that the city knew that the sidewalk would be used by the general public, then the duty rested upon the Railway Company to make the sidewalk reasonably safe for that purpose. Whether it was reasonably safe, is for you to determine; and, in determining that fact, you must take into consideration the temporary character of the walk, the purpose for which it was constructed, and all the surrounding circumstances."

The exception taken to the foregoing instruction was in the following language:

> "We except to the instruction given by the court in regard to the construction of the sidewalk by the Defendant Oregon - Washington Railroad & Navigation Company, for the reason that there is no evidence showing that the Oregon - Washington Railroad & Navigation Company constructed the sidewalk or the portion adjacent thereto referred to in the evidence." (Tr. 124.)

Surely it will not be contended that this exception will admit of the criticism now directed to the instruction in question. The exception simply goes to the proposition that it is erroneous because there is no showing that the defendant constructed the sidewalk. Now they assert it is erroneous because the word "city" is used instead of the word "company." Of course such exceptions will not be considered by the court, as has been so often announced. If the error now claimed had been called to the attention of the trial court by proper exception it would undoubtedly have corrected it.

In conclusion we say that the other requested instructions which were refused, and to which refusal defendant takes exception, were all covered in the instructions given by the court in so far as the same were applicable, and a great many of the requested instructions were wholly erroneous and were properly refused.

We respectfully submit that the judgment should be affirmed.

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